Supreme Court, U.S.
FILED
JAN 15 2004
OFFICE OF THE CLERK

No. 03-0526

In The
Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed September 23, 2003
Certiorari Granted December 1, 2003

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RELEVANT DOCKET ENTRIES

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-125325

ITEM NO.	DOCUMENT	DATE FILED
1	INDICTMENT	Mar. 16, 1982

* * *

CR-119502

ITEM NO.	DOCUMENT	DATE FILED
1	INDICTMENT	May 11, 1981

* * *

69	VERDICT	Jun. 8, 1982
70	VERDICT	Jun. 8, 1982
71	VERDICT	Jun. 8, 1982
72	VERDICT	Jun. 8, 1982
73	VERDICT	Jun. 8, 1982
74	VERDICT	Jun. 8, 1982
75	VERDICT	Jun. 8, 1982
76	VERDICT	Jun. 8, 1982
77	VERDICT	Jun. 8, 1982
78	VERDICT	Jun. 8, 1982

* * *

80	NOTICE OF INTENT TO SEEK THE DEATH SENTENCE AND SENTENCING MEMORANDUM	Jun. 11, 1982

* * *

92	SPECIAL VERDICT	Jul. 12, 1982

* * *

———

Criminal Docket
Arizona Supreme Court
CASE NUMBER
CR-82-5612-AP

DISPOSITION	CITATION
Judgments Affirmed	138 Ariz. 426; 675 P.2d 686 (1983)

* * *

26	1/18/84	ORDER AFFIRMING CONVICTIONS AND SENTENCES (Mandate)

* * *

28	1/27/84	WARRANT OF EXECUTION – Execution set for Wednesday, March 21, 1984

* * *

35	3/06/84	ORDERED: The Motion for STAY of Execution is referred to the Hon. Philip W. Marquardt, Judge of the Superior Court of Maricopa County, for consideration in connection with the petitioner's Motion for Post-Conviction Relief.
36	3/12/84	Certified copy of MCSC Minute Entry dated 3/8/84 – Sentence of death STAYED pending final determination of Petition for Post Conviction Relief.
37	10/01/85	Copy of Order (Minute Letter) in ASC #5612-2-PC – Petition for Review of Petition for Post Conviction Relief denied
38	3/04/86	WARRANT OF EXECUTION – Execution set for Weddnesday [sic], May 21, 1986
39	5/05/86	USDC Order dated 5/2/86 – Execution STAYED pending HC [USDC #CIV 86-584-PHX-RGS]

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-119502
CR-125325
(Consolidated)

ITEM NO.	DOCUMENT	DATE FILED

* * *

115.	AMENDED PETITION----------	Oct. 12, 1984
116.	RESPONSE TO AMENDED PETITION FILED OCTOBER 12, 1984.----------	Oct. 25, 1984

* * *

133.	PETITION FOR REVIEW----------	Jul. 11, 1985

* * *

Criminal Docket
Arizona Supreme Court
CASE NUMBER
CR-85-0235-PC

* * *

1	7/16/85	Petition for Review [re Post Conviction Relief]

* * *

5	10/01/85	ORDERED: Petition for Review = DENIED

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

NO. CR 119502

ITEM NO.	DOCUMENT	DATE FILED
	* * *	
139	PETITION FOR POST-CONVICTION RELIEF	Jan. 20, 1987
	* * *	
155	PETITION FOR REVIEW OF POST-CONVICTION RELIEF ORDER AND DENIAL OF MOTION FOR REHEARING	May 22, 1989
	* * *	

Criminal Docket
Arizona Supreme Court

CASE NUMBER

CR-89-0161-PC

* * *

1	5/25/89	Petition for Review of Post-Conviction Relief Order and Denial of Motion for Rehearing
2	10/24/89	ORDERED: Petition for Review of Post-Conviction Relief Order and Denial of Motion for Rehearing = Denied.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CR-119502

ITEM NO.	DOCUMENT	DATE FILED
	* * *	
167	PETITION FOR POST-CONVICTION RELIEF	JULY 18, 1991
	* * *	
180	PETITION FOR REVIEW OF POST-CONVICTION RELEIF [sic] ORDER AND DENIAL OF MOTION FOR REHEARING	FEB. 14, 1992
	* * *	

Criminal Docket
Arizona Supreme Court

CASE NUMBER

CR-93-0496-PC

* * *

1	11/17/93	Petition for Review [on Denial of the Post-Conviction Relief]
2	3/01/94	ORDERED: Petition for Review = DENIED.

* * *

U.S. District Court

U.S. District Court for the District of Arizona (Phoenix)

CIVIL DOCKET FOR CASE #: 86-CV-584

* * *

4/11/86	1	PRELIMINARY PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY (28 USC §2254).
10/1/86	1 [sic]	Case reassigned to Judge Paul G. Rosenblatt (mg)
10/1/86	24	ORDER: ORDRD transferring this case to the Hon. PGR for all subsequent proceedings.
12/3/86	30	ORDER: (PRG) Rspndnts' mtn for ordr is granted & that this matter is stayed pending the ptnr's presentation to the state crts of the 3 unexhausted clms raised on pages 26-27 of the Amnd ptn for writ of h/c by prsn in state cstdy. FUR ORDRD that the ptnr shl file his post conviction relief mtn in state crt re the 3 unexhausted clms nlt 1-20-87. Ptnr shl so notify this crt @ the ti his state post conviction relief ptn is filed. FUR ORDRD that this crt's ordr dtd 10-14-86 is vacated. Crt shl set a new dte for a rspnsv pldg to the amnd ptn @ the ti the stay is lifted. FUR ORDRD that a s/h s/b hld on 2-23-87 @ 1:30, in Crtrm #1.
1/20/87	31	Ptnr's notification of filing of ptn for post conviction relief w/state court.

* * *

11/4/94	73	The Court has ORDERED that the above captioned matter is reassigned to Judge Roslyn O. Silver for all further proceedings.

* * *

11/13/97	129	MEMORANDUM OF DECISION AND ORDER: by Judge Roslyn O. Silver: Denying w/prej ptnr's ptn for writ of h/c and all amendments thereto
11/13/97	130	JUDGMENT ORDER: by Judge Roslyn O. Silver Ptnr's ptn to writ of h/c and all amendments thereto is denied w/prej and

* * *

1/12/98	134	ORDER by Judge Roslyn O. Silver denying w/prej motion for new trial by petitioner Warren Wesley Summerlin

* * *

2/9/98	136	NOTICE OF APPEAL by petitioner Warren Wesley Summerlin from District Court order

* * *

2/27/98	138	ORDER by Judge Roslyn O. Silver granting in part and denying in part motion for certificate of probable cause by petitioner [135-1], certificate of probable cause issued for claims 1.1, 1.2, 1.3, 1.4, 2 and 4 only,

* * *

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 98-99002

3/18/98 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Certificate of probable cause granted in part and denied in part. Certificate of Probable Cause is issued for claims 1.1, 1.2, 1.3, 1.4 and 4 only.

* * *

10/10/00 ARGUED AND SUBMITTED TO Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS [98-99002]

* * *

10/12/01 AFFIRMED (Terminated on the Merits after Oral); Affirmed (in part), Reversed (in part) and Remanded; Written, Signed, Published. Alex KOZINSKI, dissenting in part; Stephen S. TROTT, author; Sidney R. Thomas, dissenting in part) FILED AND ENTERED JUDGMENT. [98-99002] (pi)

10/25/01 Filed orig and 50 copies of aplt Warren Wesley Summerlin's petition for rehearing with suggestion for rehearing en banc of 15 pages; served on 10/24/01.

* * *

10/29/01 Filed original and 50 copies of Aple Terry L Stewart's petition for rehearing with suggestion for en banc of 16 pages (3,898 words) served on 10/26/01.

* * *

2/11/02 Filed order for PUBLICATION (Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS,): The opinion filed 10/12/01 is withdrawn; submission is

deferred pending the final disposition by the Supreme Court of State v. Ring (SC No. 01-488)

* * *

10/23/02 Filed order (Alex KOZINSKI, Stephen S. TROTT, Sidney R. THOMAS,): Pursuant to General Order 5.2.b, the panel has, sua sponte, requested that a vote be taken of the nonrecused active judges of this Court as to whether this case should be heard initially by an en banc panel of this Court. Pursuant to General Order 5.4.c(3), the parties are directed tof ile [sic] simultaneous briefs within twenty-one (21) days of the date of this order setting forth their respective positions on whether (1) Ring v. Arizona, 122S.Ct.2428 (2002), may be applied retroactively and (2) this case should be heard initially by an en banc panel of this Court.

* * *

11/22/02 Filed order (Mary M. SCHROEDER): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

* * *

12/10/02 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Harry PREGERSON, participated by telephone; Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Sidney R. THOMAS, M. M. McKEOWN, Kim M. WARDLAW, Raymond C. FISHER, Richard C. TALLMAN, Johnnie B. RAWLINSON [98-99002] (eu)

* * *

9/2/03 FILED EN BANC OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Harry PREGERSON; Stephen R. REINHARDT, concurring; Diarmuid F. O'SCANNLAIN; Michael D. HAWKINS; Sidney R. THOMAS, M. M. McKEOWN; Kim M. WARDLAW; Raymond C. FISHER; Richard C. TALLMAN; Johnnie B. RAWLINSON, dissenting.) FILED AND ENTERED JUDGMENT.

* * *

9/10/03 Filed order (Sidney R. THOMAS,): Aple's unopposed motion pursuant to FRAP 41(d)(2) to stay the mandate for ninety (90) days is GRANTED.

10/14/03 Received notice from Supreme Court: petition for certiorari filed w/USSC as Supreme Court No. 03-526, filed on 9/23/03 and placed on docket on 10/8/03. (Casefiles)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
PLAINTIFF,	)	CR-119502
V.	)	CR-125325
WARREN WESLEY SUMMERLIN,	)	
DEFENDANT.	)	

PHOENIX, ARIZONA
JULY 8, 1982
1:30 P.M.

BEFORE: THE HONORABLE
PHILIP W. MARQUARDT, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AGGRAVATION/MITIGATION HEARING

VOLUME XI

APPEARANCES:

FOR THE PLAINTIFF:
JESSICA GIFFORD
ASSISTANT ATTORNEY GENERAL

FOR THE DEFENDANT:
GEORGE KLINK
COURT APPOINTED COUNSEL

[2] INDEX

WITNESS:	D	C	RD	RC	VD
BENDHEIM, OTTO L.	14	17	19		
TUCHLER, MYRON	21	23	24	25	

EXHIBITS: ADMITTED ON PAGE:

1 DOCUMENTS 6

[3] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:30 P.M.:)

THE COURT: THIS IS THE MITIGATION HEARING ON THE STATE VERSUS SUMMERLIN, CAUSE NUMBER 119502, AND 125325.

STATE READY?

MS. GIFFORD: READY, YOUR HONOR. JESSICA GIFFORD, ASSISTANT ATTORNEY GENERAL APPEARING.

THE COURT: DEFENSE READY?

MR. KLINK: DEFENDANT IS READY. GEORGE KLINK APPEARING ON BEHALF OF THE DEFENDANT.

THE COURT: THIS IS ALSO – HAVE ALL THE AFFIDAVITS AND MATERIAL BEEN FILED FOR THE MOTION FOR NEW TRIAL?

MR. KLINK: I BELIEVE THEY HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL RULE ON THAT OVER THE WEEKEND. IF YOU WANT TO ARGUE ON THAT – YOU CARE TO BE [sic] MAKE ORAL ARGUMENT AT THIS TIME?

MR. KLINK: WELL, I WOULD LIKE TO MAKE A FEW COMMENTS.

THE COURT: LET'S PROCEED ON THE ORAL ARGUMENT ON THE MOTION FOR NEW TRIAL.

MR. KLINK: THANK YOU, YOUR HONOR. OBVIOUSLY I'VE INCLUDED A NUMBER OF AREAS THAT I THINK ARE RELEVANT IN TERMS OF THE MOTION FOR NEW TRIAL.

[4] I THINK OF THE AREAS THAT I WANT TO BRING TO THE COURT'S ATTENTION, THAT I THINK IS ESPECIALLY SIGNIFICANT IN THIS, IS THE OPINION TESTIMONY OF THE POLICE OFFICER WITH REGARD TO HIS OBSERVATIONS OF BLOOD AND SEMINAL FLUID WHEN HE FOUND THE BODY, AND WHEN HE CONDUCTED THE SEARCH.

AND SPECIFICALLY DETECTIVE KLETTLINGER – I THINK WITHOUT A SHOWING OF ANY EXPERTISE IN THOSE AREAS, AND THE SHOWING THAT CLEARLY IN ORDER TO DETERMINE THE EXISTENCE OF BLOOD OR SEMINAL FLUID YOU HAVE TO CONDUCT SOME CHEMICAL TESTS, AND YOU HAVE TO KNOW HOW TO DO IT, THAT THAT AREA IS AN AREA WHICH THE DETECTIVE SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY ON.

FURTHERMORE, I WOULD REURGE THOSE OBJECTIONS, IN TERMS OF THIS MOTION WITH REGARD TO THE ADMISSIBILITY OF THE NUMEROUS PHOTOGRAPHS WHICH COULD ONLY HAVE BEEN CALCULATED AND – INTERPRETED AS CALCULATED TO INFLAME AND ENRAGE THE JURY IN ORDER TO SECURE A CONVICTION. AND WHICH HAD NO SIGNIFICANT PROBATIVE VALUE BEYOND THE FIRST OR SECOND PHOTOGRAPH.

THEY WERE CUMULATIVE, AS WELL AS UNNECESSARY TO PUT IN.

THANK YOU.

THE COURT: YOUR RESPONSE?

MS. GIFFORD: JUST BRIEFLY. I BELIEVE OUR [5] WRITTEN RESPONSE COVERS ALL OF THE LAW ON THE SUBJECT.

BRIEFLY, DETECTIVE KLETTLINGER ONLY TESTIFIED THAT IT WAS HIS OPINION THAT IT APPEARED TO BE BLOOD AND SEMINAL FLUID. I'VE CITED LAW THAT HE COULD ACTUALLY GIVE HIS OPINION. WE DIDN'T ASK HIM THAT. SO, REALLY, HE DIDN'T GIVE AN EXPERT OPINION.

AS FAR AS THE PHOTOGRAPHS GO, THEY WERE NOT CALCULATED TO PREJUDICE AND INFLAME THE JURY. NOT A SINGLE PHOTOGRAPH, ACCORDING TO THE MEDICAL EXAMINER, WAS DUPLICATIVE OF ANOTHER PHOTOGRAPH. EACH SHOWED SOMETHING DIFFERENT, AND THEY WERE VERY NECESSARY TO SHOW THE FORCE OF THE BLOWS TO THE VICTIM'S HEAD, TO HAVE STRONG ENOUGH BLOWS, SEVERAL TIMES, AND REPEATED PATTERNS OF THE BLOWS, ONE ON THAT TOP OF ANOTHER, CRUSHING HER SKULL. AND THAT WAS VERY CRUCIAL FOR THE STATE TO SHOW PREMEDITATION.

SO THERE WAS A PURPOSE FOR EACH AND EVERY ONE OF THOSE PHOTOGRAPHS. THERE WAS NOTHING CALCULATED BY THE PROSECUTION JUST TO ENRAGE THE JURY.

THE COURT: THANK YOU. I HAVE ALSO A MOTION BY THE DEFENDANT HIMSELF FOR A NEW

TRIAL, WHICH WILL BE CONSIDERED UNDER ADVISEMENT. AND I'LL GIVE YOU A RULING ON THIS BEFORE THE WEEKEND. YOU MAY PROCEED.

THE STATE MAY PROCEED WITH THE MITIGATION – LET'S SEE, THE AGGRAVATION [6] HEARING.

MS. GIFFORD: THANK YOU, YOUR HONOR. I WOULD LIKE TO MOVE FOR THE ADMISSION OF EXHIBIT NUMBER 1, WHICH IS A CERTIFIED COPY OF DOCUMENTS OF THE AGGRAVATED ASSAULT CONVICTION, THE INDICTMENT, AND A NUNC PRO TUNC MINUTE ENTRY JUST CORRECTING THE STATUTORY CITE. THEY'RE ALL CERTIFIED COPIES.

MR. KLINK: NO OBJECTION.

THE COURT: ALL RIGHT. THEY MAY BE ADMITTED.

MS. GIFFORD: YOUR HONOR, I'D LIKE TO RESERVE ARGUMENT ON WHAT THAT EXHIBIT SHOWS, THAT WE ARE INTRODUCING THAT TO SHOW THAT THE DEFENDANT HAS BEEN CONVICTED – PREVIOUSLY CONVICTED OF A CRIME INVOLVING A USE, OR THREATENED USE OF VIOLENCE ON ANOTHER PERSON, WHICH IS AN AGGRAVATING CIRCUMSTANCE UNDER OUR STATUTES.

I'D ALSO AT THIS TIME SIMPLY DIRECT THE COURT'S ATTENTION TO THE TRIAL TESTIMONY, AND I'D LIKE TO RESERVE TIME TO ARGUE WHAT THE TRIAL TESTIMONY SHOWS; THAT THE MURDER WAS CRUEL, HEINOUS OR DEPRAVED. AND THOSE ARE THE TWO AGGRAVATING CIRCUMSTANCES WE ARE USING.

THE COURT: I THINK WHAT WE DO MECHANICALLY – I THINK THE DEFENSE COUNSEL HAS ONE MORE WITNESS THAT HE WOULD WISH TO PRESENT AT A LATER TIME, WHICH WOULD [7] BE MONDAY.

SO WHAT WE CAN DO IS WE'LL HAVE AS MANY WITNESSES AS WE CAN TAKE TODAY. I UNDERSTAND TWO –

MS. GIFFORD: YOUR HONOR, I HAVE TWO. I THINK THEY'RE TECHNICALLY REBUTTAL WITNESSES TO HIS MITIGATION.

THE COURT: ALL RIGHT. THEN IF YOU HAVE A WITNESS ON MONDAY THAT YOU CARE TO PRESENT, I'LL BE GLAD TO DO THAT, AND WE'LL HAVE SENTENCING AT 1:30 ON MONDAY AFTERNOON.

MR. KLINK: I MAY REEVALUATE AFTER THE TESTIMONY TODAY.

MS. GIFFORD: MR. KLINK, I BELIEVE, HAS ONE WITNESS IN MITIGATION. I ASSUME THIS IS HIS TIME TO GO FORWARD.

THE COURT: YOU MAY PROCEED.

MR. KLINK: ALL RIGHT.

(COUNSEL CONFERRING WITH DEFENDANT).

MR. KLINK: I WILL WOULD [sic] CALL DR. TATRO.

THE COURT: ALL RIGHT. COME FORWARD AND BE SWORN, PLEASE.

YOUR CLIENT WANTS TO ASK A QUESTION.

MR. KLINK: WELL, YOUR HONOR, MAY WE APPROACH THE BENCH?

THE COURT: ALL RIGHT.

[8] (AN OFF THE RECORD DISCUSSION AT THE BENCH ENSUED, OUTSIDE THE HEARING OF THE COURT REPORTER.)

THE COURT: AT THE REQUEST OF DEFENSE COUNSEL AND HIS CLIENT, THE CLIENT WOULD LIKE TO HAVE A COUPLE OF MINUTES TO TALK OVER THE CALLING OF THIS WITNESS.

WE'LL GIVE YOU A FIVE MINUTE RECESS, AND THEN ANY DISCUSSION WILL BE ON THE RECORD.

(SHORT RECESS WAS HAD).

THE COURT: DEFENSE MAY PROCEED.

MR. KLINK: ALL RIGHT, YOUR HONOR. WITH THE CONSENT OF THE DEFENDANT, THE DEFENDANT HAS NO WITNESSES IN MITIGATION AT THIS TIME AND –

THE COURT: THIS WILL BE –

MR. KLINK: – AND WE'LL REST.

THE COURT: I'D LIKE BOTH YOU AND YOUR CLIENT TO KNOW THAT THIS IS THE TIME SET ASIDE FOR THE AGGRAVATION-MITIGATION HEARING ON THIS.

MR. KLINK: THAT'S CORRECT.

THE COURT: I PLAN TO PROCEED ON WITH SENTENCING ON MONDAY AT 1:30, AFTER I HAVE REVIEWED THE ENTIRE RECORD AND MAKE THE NECESSARY FINDINGS.

SO AT THAT TIME YOU HAVE – YOU TELL ME THAT YOU HAVE ONE WITNESS THAT YOU MAY PRESENT ON MONDAY?

[9] MR. KLINK: WELL, I WOULD NOT CALL ANY WITNESSES AT ALL.

THE COURT: ALL RIGHT.

MR. KLINK: EITHER TODAY OR ON MONDAY, YOUR HONOR.

THE COURT: I'LL ALLOW THE DEFENDANT TO MAKE ANY STATEMENT THAT HE WISHES TO ME, OR NONE, ON MONDAY.

MR. KLINK: ALL RIGHT.

THE COURT: MISS GIFFORD?

MS. GIFFORD: YOUR HONOR, IT'S MY UNDERSTANDING – AT LEAST MY IMPRESSION – THAT THIS IS THE DEFENDANT'S DECISION THAT HE DOES NOT WISH CERTAIN WITNESSES TO BE CALLED.

COULD WE HAVE THAT REFLECTED ON THE RECORD, PERHAPS, BECAUSE –

THE COURT: I THINK IT HAS BEEN, AND MR. SUMMERLIN, I'LL ADDRESS YOU DIRECTLY, TO MAKE SURE THAT – FOR ANY ERROR THAT MIGHT

POSSIBLY BE CLAIMED AT THIS TIME – TO MAKE SURE THAT YOU UNDERSTAND THAT YOU ARE FACING A POTENTIAL DECISION BETWEEN EITHER LIFE IMPRISONMENT OR THE DEATH PENALTY, AND THIS IS THE TIME IN WHICH YOU MUST DECIDE WHETHER YOU PRESENT ANY MITIGATION WITNESSES ON YOUR BEHALF.

THIS IS YOUR ENTITLEMENT. YOUR LAWYER HAS TOLD ME THAT AT THIS TIME YOU DO NOT WISH TO, AND [10] HE IS TELLING ME THAT YOU DO NOT WISH TO CALL ANY MITIGATION WITNESSES. IF THIS IS CORRECT I'LL ACCEPT YOUR DECISION.

BUT I WANT IT TO BE VERY CLEAR THAT THIS IS THE TIME, AND ONLY TIME, THAT YOU'LL BE ABLE TO HAVE TO DO THIS.

SO YOU DON'T EVEN NEED TO RESPOND TO ME. YOU UNDERSTAND WHAT I'M TELLING YOU?

THE DEFENDANT: YES.

THE COURT: ALL RIGHT. FINE THEN.

THE DEFENDANT: LET ME TALK TO HIM.

THE COURT: YES.

(COUNSEL CONFERRING WITH DEFENDANT)

THE COURT: I THINK PROBABLY IT WOULD ALSO BE FAIR FOR ME TO TELL YOU, JUST TO MAKE SURE WE UNDERSTAND EACH OTHER, THAT UNDER THE STATUTES AND UNDER THE CODE THAT I OPERATE UNDER IN ARIZONA, THERE ARE A LIST OF AGGRAVATING FACTORS, AND A LIST OF MITIGATING FACTORS THAT HAVE TO BE DETERMINED.

THOSE FACTORS – CERTAIN AGGRAVATING FACTORS HAVE BEEN PRESENTED TO ME BY THE STATE OF ARIZONA. IF I FIND ANY ONE OF THOSE AGGRAVATING FACTORS TO EXIST – IF I FIND AN ABSENCE OF – OR NO MITIGATING FACTORS – THEN I'M AUTHORIZED TO GIVE THE MAXIMUM PENALTY, WHICH CAN BE THE DEATH PENALTY.

[11] I WANT YOU TO KNOW THAT AT THIS TIME I HAVE MADE NO DECISION AT THIS TIME OF WHAT I'M GOING TO DO IN YOUR PARTICULAR CASE. THAT WILL BE OVER THE WEEKEND, AFTER I'VE HEARD FINAL ARGUMENT BY BOTH COUNSEL.

MR. KLINK: ONLY THING I WOULD ADD AT THIS TIME, YOUR HONOR – AT THIS TIME THE DEFENDANT HAS REQUESTED, AND OBVIOUSLY THE STATE WILL HAVE AN OPPORTUNITY TO RESPOND – BUT THERE WAS A TRANSCRIPT OF A VIDEO TAPED DEPOSITION THAT WAS PREPARED AND TAKEN AT THE ATTORNEY GENERAL'S OFFICE SOMETIME PRIOR TO TRIAL. AND THE DEFENDANT HAS REQUESTED THAT THE COURT REVIEW THAT VIDEO TAPED DEPOSITION.

I BELIEVE THE TRANSCRIPT WOULD BE SUFFICIENT IN MAKING A DETERMINATION. THE DEFENDANT BELIEVES IT WOULD BE IN HIS BEST INTEREST FOR YOU TO DO THAT. I DON'T BELIEVE THE STATE HAS OBJECTIONS TO THAT OR NOT.

MS. GIFFORD: I HAVE NO OBJECTION, IN VIEW OF THE COURT – THAT THE COURT IS REQUIRED TO CONSIDER ANYTHING OFFERED IN MITIGATION.

THE COURT: HAS THAT BEEN PREPARED FOR YOU?

MR. KLINK: I BELIEVE MR. TOTH HAS PREPARED IT, AND IT'S PROBABLY BEEN FILED ALREADY.

THE COURT: I'LL REVIEW THAT OVER THE WEEKEND, [12] WITHOUT ANY FURTHER COMMENT. CONSIDER IT DONE.

MR. KLINK: OKAY.

MS. GIFFORD: YOUR HONOR, THE STATE WAS ANTICIPATING CALLING CERTAIN REBUTTAL WITNESSES. MAY THOSE WITNESSES BE EXCUSED FROM THEIR SUBPOENAS AT THIS TIME?

THE COURT: AGAIN, MY QUESTION TO YOU, AFTER YOU'VE TALKED TO YOUR CLIENT – DO YOU HAVE – IS IT STILL YOUR DECISION – AND IT'S STRICTLY YOUR DECISION – WHETHER TO CALL WITNESSES OR NOT?

MR. KLINK: YES, YOUR HONOR. WE HAVE NOTED IN THE PRESENTENCE REPORT DR. TATRO'S EVALUATION OF THE DEFENDANT IS INCLUDED AND ATTACHED THERETO. AND THEREFORE, IN CONSULTING WITH THE DEFENDANT, WE HAVE DECIDED, AND I BELIEVE THAT IS HIS DECISION, AS WELL AS MINE, IN CONSULTATION WITH HIM, TO RELY ON THE REPORT THAT HAS BEEN – THE EVALUATION OF DR. TATRO THAT HAS BEEN ATTACHED TO THE PRESENTENCE REPORT.

THE COURT: I HAVE THAT AVAILABLE, AND HAVE SPENT QUITE A BIT OF TIME WITH THAT.

MS. GIFFORD: THAT BEING THE CASE, I DO HAVE TO CALL MY REBUTTAL WITNESSES.

MS. GIFFORD: MAY I PROCEED AT THIS TIME?

THE COURT: YES, YOU MAY PROCEED.

THE DEFENSE HAS NO WITNESSES?

[13] MR. KLINK: RIGHT.

MS. GIFFORD: THANK YOU.

THE COURT: IT'S NOTED THAT NO WITNESSES ARE CALLED AT THIS TIME, OTHER THAN IN THE PSYCHIATRIC STATEMENT REFERRED TO, AND THE TRANSCRIPT.

MR. KLINK: RIGHT. WELL, THE REASON I POINT THAT OUT, YOUR HONOR, IS THAT IT IS ATTACHED TO THE PRESENTENCE REPORT. IT'S OBVIOUSLY SOMETHING THAT THE COURT IS GOING TO CONSIDER ANYWAY.

THE COURT: YES, I WILL.

MR. KLINK: I DON'T SEE THAT THAT SHOULD CHANGE THE STATE'S POSITION.

THE COURT: I'M SORRY. NOW, IT'S THE STATE'S POSITION – IT'S YOUR POSITION THERE ARE NO FURTHER WITNESSES AT THIS TIME?

MR. KLINK: THAT'S CORRECT.

THE COURT: I'LL GIVE YOU A CHANCE TO REBUT, IF YOU CHOOSE TO HAVE ANY REBUTTAL.

YOU MAY PROCEED ON.

MS. GIFFORD: THANK YOU, YOUR HONOR. I WOULD CALL DR. BENDHEIM.

THE COURT: COME FORWARD AND BE SWORN, PLEASE. PLEASE TAKE THE STAND.

(NEXT PAGE, PLEASE.)

[14] OTTO L. BENDHEIM, M.D., CALLED AS A WITNESS HEREIN, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. GIFFORD:

Q. WOULD YOU STATE YOUR NAME, PLEASE?

A. OTTO L. BENDHEIM.

Q. WHAT IS YOUR PROFESSION, DOCTOR?

A. I'M A PHYSICIAN, SPECIALIZING IN PSYCHIATRY.

Q. HOW LONG HAVE YOU BEEN IN THAT PROFESSION?

A. I WAS BOARD CERTIFIED IN 1948.

THE COURT: COUNSEL, WILL YOU STIPULATE TO DR. BENDHEIM'S QUALIFICATIONS?

MR. KLINK: YES.

THE COURT: ALL RIGHT. YOU MAY PROCEED.

MS. GIFFORD: THANK YOU, YOUR HONOR.

Q. DOCTOR, HAVE YOU HAD OCCASION TO EXAMINE WARREN WESLEY SUMMERLIN?

A. YES.

Q. CAN YOU POINT HIM OUT?

A. YES. HE'S SITTING NEXT TO COUNSEL – LEFT SIDE OF COUNSEL.

Q. THANK YOU. WHEN DID YOU EXAMINE MR. [15] SUMMERLIN?

A. ON JULY 7, 1981, JUST ABOUT A YEAR AGO.

Q. WHERE WAS THAT?

A. IN THE MARICOPA COUNTY JAIL.

Q. WHAT WAS YOUR PURPOSE IN EXAMINING HIM THEN?

A. THIS WAS A COURT APPOINTMENT FOR A DETERMINATION OF COMPETENCY. AND IF POSSIBLE, A DETERMINATION OF FRAME OF MIND AT THE TIME OF THE OFFENSE.

Q. CAN YOU SUMMARIZE YOUR FINDINGS IN REGARD TO THE RULE 11 EXAMINATION?

A. YES, MA'AM. I FOUND HIM COMPETENT TO STAND TRIAL, AT THE TIME I EXAMINED HIM, AND I FOUND NO EVIDENCE OF ANY TYPE OF MAJOR

PSYCHIATRIC DISORDER THAT COULD BE DIAGNOSED, THAT I COULD POINT OUT AT THE TIME OF THE ALLEGED OFFENSES.

I DID FIND THE PERSONALITY OF CHARACTER DISORDER.

Q. DO YOU HAVE AN OPINION WHETHER, TO A DEGREE OF REASONABLE MEDICAL CERTAINTY, MR. SUMMERLIN'S CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT WAS SIGNIFICANTLY IMPAIRED AT THE TIME OF THE CRIME?

A. YES, I HAVE AN OPINION. MY EXAMINATION [16] REVEALED NOTHING THAT WOULD INDICATE THAT HE WOULD BE UNABLE TO DO SO.

Q. LET ME ASK YOU THIS QUESTION, ALSO. DO YOU HAVE AN OPINION TO A DEGREE OF REASONABLE MEDICAL CERTAINTY, WHETHER HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SIGNIFICANTLY IMPAIRED?

A. LET ME SAY THAT I FOUND NOTHING THAT WOULD INDICATE TO ME THAT HE HAD SUCH AN IMPAIRMENT.

I WILL QUALIFY, HOWEVER. I TALKED TO ONE PSYCHIATRIST, WHO I RESPECT VERY HIGHLY, DR. GARCIA, WHO HAD A DIFFERENT OPINION FROM MINE.

Q. DID YOU FIND ANY EVIDENCE TO SUPPORT WHAT YOU DISCUSSED WITH DR. GARCIA?

A. NO. I MUST SAY THAT I COULD NOT GO ALONG WITH HIS THINKING IN THIS MATTER.

Q. DID YOU FIND ANY EVIDENCE OF PYSCHOMOTOR EPILEPSY?

A. NO. I REQUESTED, AND DR. GARCIA REQUESTED, NEUROLOGICAL EVALUATION. THAT WAS DONE. THE ONLY THING THAT REVEALED, WHICH WAS VERY SLIGHTLY MINIMALLY SUGGESTIVE, IS A MINOR DISTURBANCE IN THE ELECTROENCEPHALOGRAPHIC WAIVE PATTERN IN THE ELECTROENCEPHALOGRAM; SLIGHT DISTURBANCE.

AND THE NEUROLOGIST WAS NOT ABLE TO MAKE AN EVALUATION ON THE PYSCHOMOTOR.

[17] MS. GIFFORD: THANK YOU. I HAVE NO FURTHER QUESTIONS.

THE COURT: CROSS EXAMINATION?

CROSS EXAMINATION

BY MR. KLINK:

Q. YOU DID SAY THAT YOU – WELL, LET ME ASK YOU THIS, DOCTOR: DO YOU RECALL WRITING A LETTER TO JUDGE DERICKSON IN DECEMBER OF 1981?

A. YES, I DO.

Q. AND –

A. WAIT A MOMENT. DECEMBER? YES, I HAVE DECEMBER 1ST, 1981.

Q. OKAY. AND YOU DID REPORT IN THAT LETTER DR. GARCIA'S FINDING THAT MR. SUMMERLIN HAD VERY VIVID OLFACTORY HALLUCINATIONS PRECEDING OUTBURSTS, DID YOU NOT, SIR?

A. YES.

Q. WHAT DOES THAT – CAN YOU TELL ME WHAT THAT TERMINOLOGY MEANS? NOW, I KNOW YOUR OPINION IS DIFFERENT FROM DR. GARCIA'S, BUT OBVIOUSLY HE MADE SUCH A FINDING. AND IF YOU CAN TELL US, IN LAYMAN'S LANGUAGE, WHAT THAT TERMINOLOGY, "VIVID OLFACTORY HALLUCINATIONS PRECEDING OUTBURSTS" – WHAT DOES THAT MEAN?

[18] A. HALLUCINATIONS IS A SENSORY PERCEPTION, WHICH IS NOT BASED UPON PERCEIVABLE FACTS. IN OTHER WORDS, IF SOMEBODY HAS AN OLFACTORY, OR SMELL HALLUCINATION, HE EXPERIENCES A SENSATION OF SMELL, OF ODOR, OF SCENT THAT NOBODY ELSE CAN DETECT, BECAUSE IT ISN'T IN REALITY. IT'S NOT PRESENT. IT'S INTERNALLY PRODUCED DUE TO SOME CENTRAL NERVOUS SYSTEM TYPE OF ACTION.

NOW, IF THIS OCCURS, IN THE ABSENCE OF MAJOR MENTAL ILLNESS, IN THE ABSENCE OF, LET'S SAY, SCHIZOPHRENIA, AND IF IT OCCURS JUST AHEAD OF AN EXPLOSIVE TYPE OF OUTBURST, A RAGE REACTION, WE VERY STRONGLY THINK OF PSYCHOMOTOR EPILEPSY.

WE CALL THAT ILLUSIONARY AURA, A PREMONITION OR SOME KIND OF INITIATION OF A SEIZURE WHICH OCCURS INVOLUNTARILY. WHEN THE SEIZURE THEN OCCURS, THEN ONE WOULD BE JUSTIFIED IN POSTULATING THAT THE MAN LOSES CONTROL OVER HIS CONDUCT OR HIS ACTIVITIES AND IS NOT FULLY – MAY BE NOT AT ALL AWARE OF HIS CONDUCT.

SO DR. GARCIA CALLED ME AND GAVE ME THE STRONG IMPRESSION THAT HE FELT THIS WAS PRESENT. I SUGGESTED NEUROLOGICAL EVALUATION. IT WAS DONE, AND THE NEUROLOGIST COULDN'T CONFIRM DR. GARCIA'S IMPRESSION. NEITHER COULD I, REALLY.

[19] BUT NEVERTHELESS, IN MANY CASES THAT DR. GARCIA AND I WORK TOGETHER, WE HAVE BEEN IN CONFORMITY, USUALLY 99 PERCENT OF THE CASES.

SO THAT WAS ONE WHERE WE DIDN'T AGREE, AND THAT'S WHY I FELT I SHOULD MENTION IT TO THE COURT.

Q. WELL, I THINK THE COURT WILL FIND THAT VERY SIGNIFICANT. AND I THANK YOU FOR YOUR CANDOR.

SO THIS IS – THIS IS ONE AREA OF POSSIBILITY WHERE EXPERTS CAN DISAGREE, AND IN FACT HAVE DISAGREED, ISN'T THAT CORRECT?

A. YES.

Q. ALL RIGHT. AND YOU DO VERY HIGHLY RESPECT DR. GARCIA IN HIS EVALUATION?

A. I DO.

MR. KLINK: ALL RIGHT. THANK YOU VERY MUCH, DOCTOR.

THE COURT: STATE?

MS. GIFFORD: JUST ONE QUESTION, YOUR HONOR.

REDIRECT EXAMINATION

BY MS. GIFFORD:

Q. YOU FOUND – YOU AND THE NEUROLOGIST FOUND ABSOLUTELY NO EVIDENCE OF OLFACTORY HALLUCINATIONS, THOUGH, IS THAT CORRECT?

A. NO. NOW, THE WORD "ABSOLUTELY" BOTHERS [20] ME A LITTLE BIT. BECAUSE THE NEUROLOGIST DID FIND A MINOR ELECTROENCEPHALOGRAM DISTURBANCE IN THE TEMPORAL LOBE – IN THE AREA WHERE TEMPORAL LOBE OR PSYCHOMOTOR TYPE OF EPILEPSY ORIGINATES.

Q. THERE WAS NO CONFIRMATION, HOWEVER, THAT THERE IS OLFACTORY HALLUCINATIONS PRESENT, IS THAT CORRECT?

A. I WAS NOT AWARE OF IT, YES.

Q. AND YOU DID NOT FIND IT YOURSELF?

A. THAT'S CORRECT.

Q. YOU DISAGREE WITH DR. GARCIA IN HIS FINDING, CORRECT?

A. YES.

MS. GIFFORD: THANK YOU. NO FURTHER QUESTIONS.

MR. KLINK: NOTHING FURTHER. THANK YOU.

THE COURT: YOU MAY STEP DOWN. THANK YOU FOR TESTIFYING. YOU'RE PERMANENTLY EXCUSED.

MS. GIFFORD: YOUR HONOR, I CALL DR. TUCHLER

THE COURT: ALL RIGHT.

THE WITNESS: MYRON TUCHLER.

THE COURT: PLEASE TAKE THE STAND.

(NEXT PAGE, PLEASE.)

[21] MYRON TUCHLER, M.D.,

CALLED AS A WITNESS HEREIN, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. GIFFORD:

Q. WOULD YOU STATE YOUR NAME, PLEASE?

A. MYRON TUCHLER.

Q. WHAT IS YOUR PROFESSION, SIR?

A. PHYSICIAN.

Q. AND DO YOU HAVE A SPECIALTY AREA?

A. PSYCHIATRY, NEUROLOGY.

MS. GIFFORD: I WONDER IF COUNSEL WILL STIPULATE TO THE QUALIFICATIONS OF THIS EXPERT.

MR. KLINK: I SO STIPULATE.

THE COURT: THANK YOU. YOU MAY PROCEED.

BY MS. GIFFORD:

Q. DID YOU HAVE OCCASION TO EXAMINE THE DEFENDANT IN THIS CASE, DR. TUCHLER?

A. I DID, MISS GIFFORD.

Q. WHEN DID YOU DO THAT?

A. I THINK IN JUNE, THE 30TH, 1981.

Q. AND YOUR PURPOSE IN EXAMINING HIM, SIR?

A. RULE 11.

Q. WHAT WERE YOUR CONCLUSIONS, JUST BRIEFLY?

[22] A. PERSONALITY DISORDER WITH A SUBHEADING OF AN EXPLOSIVE PERSONALITY, AND A SUBHEADING OF A LEARNING DISABILITY.

Q. ARE ANY OF THOSE MAJOR MENTAL ILLNESSES?

A. NO.

Q. DO YOU HAVE AN OPINION ON WHETHER THE ABILITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT WAS SIGNIFICANTLY IMPAIRED?

A. I HAVE.

Q. AND WHAT IS YOUR OPINION?

A. IT WAS NOT.

Q. DO YOU ALSO HAVE AN OPINION ON WHETHER THE DEFENDANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF LAW WAS SIGNIFICANTLY IMPAIRED?

A. I HAVE AN OPINION.

Q. AND WHAT IS IT?

A. IT WAS NOT.

Q. HOW WOULD YOU EXPLAIN HIS BEHAVIOR?

A. HE HAS A LONG HISTORY OF PERSONALITY DISORDER, WHICH EXPLAINS THE BEHAVIOR, BUT IT'S NOT A MENTAL DISEASE OR DEFECT.

Q. BUT IT'S NOT A MENTAL DISEASE OR DEFECT THAT CAUSES IT?

A. NO. IT'S A PERSONALITY DISORDER, NOT A MENTAL DISEASE. THE ONLY ONE ISSUE I FOUND FROM [23] EXAMINING HIM, WITH SOME CARE, WAS THAT HE COULDN'T READ AND WRITE; THAT HE

HAD A LEARNING DISABILITY; THAT HE ALSO HAD A READING AND WRITING DISABILITY.

HE WAS DYSLEXIC, WHICH HAS BEEN WITH HIM EVER SINCE CHILDHOOD. AND ALSO HE HAD A TYPE OF PERSONALITY THAT EXPLODES IN RAGE ON THE LEAST PROVOCATION OR MINIMAL PROVOCATION. THAT FITS INTO THE CATEGORY OF PERSONALITY DISORDERNESS.

Q. DYSLEXIA, IT'S A LEARNING DISABILITY, CORRECT?

A. THE INABILITY TO READ, RIGHT.

MS. GIFFORD: YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF DR. TUCHLER AT THIS TIME.

THE COURT: CROSS EXAMINATION?

CROSS EXAMINATION

BY MR. KLINK:

Q. DOCTOR, WITH REGARD TO THIS EXPLOSIVE PERSONALITY, ONCE THE EXPLOSIVE EVENT IS SET IN MOTION, ARE THERE INDIVIDUALS WHO THEN NO LONGER HAVE ANY DEGREE OF CONTROL IN MINIMIZING THE DAMAGE THAT EXPLOSIVE EVENT CAN CAUSE?

A. I HAVE TO AGREE WITH THAT IN THE AFFIRMATIVE, SIR.

Q. OKAY. I TAKE IT – HAVE YOU AN OPINION [24] AS TO WHETHER MR. SUMMERLIN IS IN THAT CATEGORY?

A. WELL, I HAVE AN OPINION. I SO STATED IT IN MY REPORT. BASED UPON HIS BEHAVIOR IN HAMMERING AWAY AT AN AUTOMOBILE, THAT IS THE INDEX THAT I USED IN COMING TO THAT CONCLUSION.

Q. THIS IS AN INCIDENT WHERE SOMEONE HIT HIS WIFE WITH AN AUTOMOBILE, AND HE WENT BERSERK AND BEAT THE AUTOMOBILE UP, SO-TO-SPEAK?

A. YES, THAT'S EXACTLY IT.

Q. AND THAT'S THE KIND OF PERSONALITY WE ARE DEALING WITH?

A. YES.

MR. KLINK: ALL RIGHT. I HAVE NO FURTHER QUESTIONS. THANK YOU.

THE COURT: REDIRECT?

MS. GIFFORD: THANK YOU, YOUR HONOR.

REDIRECT EXAMINATION

BY MS. GIFFORD:

Q. DOCTOR, IS IT CORRECT TO SAY THAT HE HAS THE CAPACITY TO CONTROL THIS EXPLOSIVE PERSONALITY, BUT HE JUST DOESN'T?

A. ONCE IT'S TRIGGERED HE LOSES CONTROL. BUT THIS IS NOT A PSYCHOSIS. THIS IS A PERSONALITY TRAIT.

[25] MS. GIFFORD: OKAY. THANK YOU, YOUR HONOR. I HAVE NO FURTHER QUESTIONS.

MR. KLINK: I DO HAVE MAYBE ONE OR TWO OTHER QUESTIONS.

RECROSS EXAMINATION

BY MR. KLINK:

Q. DOCTOR, WHAT KIND – IS IT EXTERNAL STIMULI THAT TRIGGERS THAT EXPLOSIVENESS AND THEN THIS INABILITY TO CONTROL?

A. I CAN'T ANSWER THAT. I'D HAVE TO GO INTO MORE DETAIL. IN THE CASE OF THE AUTOMOBILE, AND HIS BEATING ON THE AUTOMOBILE, OBVIOUSLY IT WAS SOMETHING EXTERNAL. BUT THE SPECIAL STRUCTURE OF A MIND THAT FUNCTIONS IN THIS WAY IS, OF COURSE, THE ENIGMA WITH WHICH WE ARE DEALING.

MR. KLINK: I HAVE NO FURTHER QUESTIONS.

THANK YOU, DOCTOR.

THE COURT: YOU MAY STEP DOWN. THANK YOU FOR TESTIFYING. YOU'RE EXCUSED PERMANENTLY.

THE WITNESS: THANK YOU.

MS. GIFFORD: YOUR HONOR, I HAVE NO FURTHER REBUTTAL WITNESSES.

THE COURT: MR. KLINK, DO YOU HAVE ANYTHING FURTHER TO PRESENT OTHER THAN,

CLOSING STATEMENT AT THE [26] TIME OF SENTENCING ON MONDAY?

MR. KLINK: WE WOULD HAVE NOTHING FURTHER, YOUR HONOR, AND WE WOULD BE PREPARED FOR SENTENCING ON MONDAY.

THE COURT: MONDAY AT 1:30. I'LL SEE YOU THEN.

* * *

I, STEVEN C. TOTH, JR., OFFICIAL COURT REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING PAGES NUMBERED 2 THROUGH 26, CONSTITUTE A FULL, TRUE AND ACCURATE RECORD OF MY STENOGRAPHIC NOTES, TAKEN AT SAID TIME AND PLACE, TRANSCRIBED THROUGH THE ASSISTANCE OF COMPUTER. ALL DONE TO THE BEST OF MY SKILL AND ABILITY.

DATED THIS 14TH DAY OF NOVEMBER, 1982.

STEVEN C. TOTH, JR.
OFFICIAL COURT REPORTER

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, PLAINTIFF, V. WARREN WESLEY SUMMERLIN, DEFENDANT.	CR-119502 CR-125325

PHOENIX, ARIZONA
JULY 12, 1982
1:40 P.M.

BEFORE: THE HONORABLE
PHILIP W. MARQUARDT, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING
VOLUME XII

APPEARANCES:

FOR THE PLAINTIFF:
JESSICA GIFFORD
ASSISTANT ATTORNEY GENERAL

FOR THE DEFENDANT:
GEORGE KLINK
COURT APPOINTED COUNSEL

* * *

[2] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:40 P.M.)

THE COURT: THIS IS CAUSE NUMBER CR-119502 AND 125325, STATE VERSUS WARREN SUMMERLIN.

STATE READY?

MS. GIFFORD: READY, YOUR HONOR. JESSICA GIFFORD APPEARING FOR THE STATE.

THE COURT: DEFENSE READY?

MR. KLINK: DEFENDANT IS READY. GEORGE KLINK APPEARING ON BEHALF OF THE DEFENDANT.

THE COURT: WOULD YOU APPROACH THE BENCH, PLEASE, MR. SUMMERLIN? UP HERE.

I'LL ADDRESS HIM STANDING HERE.

OKAY, MR. SUMMERLIN, YOU CAN STEP BACK JUST A LITTLE BIT, PLEASE.

YOU'VE BEEN CHARGED BY THE STATE OF ARIZONA WITH THE CRIME OF MURDER, FIRST DEGREE, A CLASS 1 FELONY, AND SEXUAL ASSAULT, A CLASS 2 FELONY. AND YOU'VE BEEN FOUND GUILTY OF THESE CHARGES BY A JURY.

DO YOU HAVE ANYTHING TO SAY OR ANY LEGAL CAUSE TO SHOW WHY JUDGMENT AND SENTENCE SHOULD NOT NOW BE PRONOUNCED?

THE DEFENDANT: YES, SIR, I DO.

THE COURT: ALL RIGHT. FIRST OF ALL, ANY [3] LEGAL CAUSE?

MR. KLINK: NO LEGAL CAUSE, YOUR HONOR, THAT I'M AWARE OF, YOUR HONOR.

THE COURT: MR. SUMMERLIN, DO YOU HAVE ANYTHING TO SAY OR ANY LEGAL CAUSE?

THE DEFENDANT: YES, I DO HAVE. I'VE FILED A MOTION. IT'S ON HER DESK OVER THERE. I'D LIKE THE JUDGE TO TAKE A LOOK AT IT BEFORE PASSING SENTENCE.

THE COURT: ALL RIGHT. WELL, IT'S GOING TO TAKE ME FIVE MINUTES TO READ THIS, SO WE'LL RECESS FOR FIVE OR TEN MINUTES.

SO, WE'LL STAND IN RECESS WHILE I GO OVER THIS MOTION THAT – COUNSEL, HAVE YOU RECEIVED A COPY OF THIS?

MS. GIFFORD: NO, YOUR HONOR, I'VE NOT.

THE DEFENDANT: THERE IS ONLY ONE.

THE COURT: WE'LL STAND IN RECESS FOR FIVE MINUTES. I'LL MAKE IT AVAILABLE TO COUNSEL AFTER I'VE READ IT. STAND IN RECESS FOR FIVE MINUTES.

(A SHORT RECESS WAS HAD.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AT 1:50 P.M.)

THE COURT: IT'S A MOTION TO VACATE JUDGMENT BY MR. SUMMERLIN. I'VE READ IT. IS THERE ANYTHING ADDITIONAL ON THAT?

[4] MR. KLINK: I HAVE NOTHING, YOUR HONOR.

THE COURT: ALL RIGHT. I'LL DENY THE MOTION.

MR. KLINK, DO YOU HAVE ANYTHING THAT YOU'D LIKE TO PRESENT?

FIRST OF ALL, STATE HAVE ANYTHING IT WOULD LIKE TO PRESENT AT THIS TIME?

MS. GIFFORD: BRIEFLY, YOUR HONOR. I HAVE FILED A MEMORANDUM, THAT I'M SURE THE COURT HAS RECEIVED, INDICATING WHY THE MAXIMUM SENTENCE SHOULD RUN CONSECUTIVELY ON THE SEXUAL ASSAULT CHARGE. THE STATE'S ASKING FOR 28 YEARS TO BE IMPOSED CONSECUTIVELY FOR THE OTHER CHARGES THAT – THE OTHER SENTENCE HE'S SERVING.

AND I SET OUT SEVERAL AGGRAVATING CIRCUMSTANCES THERE: THE INFLICTION OF SERIOUS PHYSICAL INJURY, THE USE OF A DANGEROUS INSTRUMENT DURING THE CRIME, HIS LONG HISTORY, INCLUDING PRISON CONFINEMENT IN THE PAST, HASN'T AFFECTED HIM ON PROBATION, WHILE HE COMMITTED THESE CRIMES ON THE VICTIM.

JUST BRIEFLY, ON THE MURDER ISSUE THE STATE IS SEEKING THE DEATH PENALTY FOR THIS CRIME. WE HAVE ESTABLISHED, I BELIEVE BEYOND A REASONABLE DOUBT, TWO AGGRAVATING CIRCUMSTANCES.

EXHIBIT NUMBER 1 IS A PACKET OF DOCUMENTS [5] THAT WAS MARKED LAST FRIDAY, THAT INCLUDES THE INDICTMENT FOR AGGRAVATED ASSAULT IN CR-119567, INDICATING THAT HE WAS

CHARGED WITH USING A KNIFE AND INTENTIONALLY PLACING MARY LEYVAS IN REASONABLE APPREHENSION OF IMINENT [sic] PHYSICAL INJURY.

AND THE MINUTE ENTRIES ATTACHED TO THAT, WITH THE STATUTORY CITATIONS, CLEARLY INDICATE THAT HE'S BEEN CONVICTED OF THE FELONY INVOLVING A THREAT OR USE OF VIOLENCE ON ANOTHER PERSON. THAT ESTABLISHES BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCE F-2.

I'VE ALSO SET OUT, IN LENGTH, IN THE MEMORANDUM, THE REASONS THE STATE FEELS THIS IS A CRUEL, HEINOUS, DEPRAVED MURDER. AND JUST BREIFLY [sic] LET ME EMPHASIZE THE TERROR THIS YOUNG WOMAN MUST HAVE GONE THROUGH BY FIRST BEING RAPED AND THEN BRUTALLY ATTACKED; THE PAIN SHE MUST HAVE EXPERIENCED, PHYSICAL AND MENTAL.

THERE WAS THE DOCTOR'S TESTIMONY THAT THERE WAS A DEFENSIVE BLOW TO HER HAND, PROTECTIVE BLOW TO PROTECT HER FROM THE BLOWS COMING TO HER HEAD. IT'S HEINOUS AND DEPRAVED FOR THE FACT THAT HE ABSOLUTLY [sic] CRUSHED HER SKULL AS THE PHOTOGRAPHS INDICATE.

THE FORCE OF THE BLOWS NECESSARY TO GO [6] THROUGH HER HEAD AND CRUSH HER SKULL, THE DEPRAVITY IN USING HIS CHILDREN TO TAKE UP THE FLOOR TILE AND PUT THOSE IN THE TRASH, AND USING HIS OWN LITTLE GIRL'S BLANKET TO WRAP HER UP IN, AND ALSO THE DEPRAVITY OF NOT EVEN COVERING HER BODY AND JUST

STUFFING HER IN THE TRUNK TO BE FOUND LATER ON.

I BELIEVE WE HAVE SHOWN THOSE TWO AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

THE COURT: MR. KLINK?

MR. KLINK: THANK YOU, YOUR HONOR. YOUR HONOR, I WANT TO ADDRESS MYSELF TO TWO MATTERS WITH REGARD TO MITIGATION, BOTH OF WHICH WERE ADDRESSED IN THE PRESENTENCE REPORT, AND ONE OF WHICH WAS ADDRESSED BY THE TESTIMONY OF THE EXPERTS.

YOU HAVE IN THE PRESENTENCE REPORT THE REPORT OF DR. TATRO. YOU HEARD TWO WITNESSES CALLED BY THE STATE, DR. BENDHEIM AND DR. TUCKLER. AND I BELIEVE YOU HEARD TESTIMONY, AND YOU REVIEWED IN THAT PRESENTENCE REPORT, THE KIND OF PSYCHIATRIC PROBLEMS THAT THIS INDIVIDUAL HAS.

GRANTED, THEY MAY NOT BE SIGNIFICANT ENOUGH TO JUSTIFY AN INSANITY DEFENSE. BUT IT SEEMS TO ME THAT THE TESTIMONY YOU HEARD AND THE REPORT OF DR. TATRO THAT YOU REVIEWED IS OVERWHELMINGLY SUPPORTIVE OF A MITIGATING FACTOR THAT THIS COURT [7] SHOULD FIND.

AND THAT IS THAT THIS INDIVIDUAL APPEARS TO BE A CLASSIC IRRESISTIBLE IMPULSE PERSONALITY. DR. BENDHEIM HIMSELF SAID, AND DR. TUCKLER HIMSELF SAID, THAT ONCE THIS INDIVIDUAL SETS INTO ACTION, AS A RESULT OF

EXTERNAL STIMULI OR INTERNAL STIMULI, WHICH THEY DID NOT KNOW, THAT THE LOGICAL CONCLUSION OF THOSE EVENTS ARE BEYOND HIS CONTROL.

AND DR. BENDHEIM INDICATED TO YOU THAT THERE IS A FOURTH PROFESSIONAL, WHO HAS INDICATED THE PSYCHOMOTIVE EPILEPSY ABOUT WHICH YOU HEARD TESTIMONY FRIDAY. AND I THINK DR. TATRO'S REPORT SUMS IT UP VERY CLEARLY, AND VERY SUCCINCTLY.

THIS INDIVIDUAL IS DEEPLY EMOTIONALLY AND MENTALLY DISTURBED, UNAWARE OF THE MOTIVES UNDERLYING HIS BEHAVIOR, AND UNABLE, BECAUSE OF HIS PROBLEMS, TO EXERCISE RESTRAINT IN A NORMAL WAY OR CONTROL, ONCE HIS HIGHLY UNSTABLE AND VOLITILE [sic] EMOTIONS ARE AROUSED.

AND THEREFORE, THIS SHOULD BE TAKEN INTO CONSIDERATION AS A MITIGATING FACTOR. AND THEN THE DIAGNOSIS THAT DR. TATRO MADE, BORDERLINE PERSONALITY DISORDER, CHARACTERIZED BY GREAT IMPULSIVITY AND UNPREDICTIBILITY, THE HALLMARK OF THAT DISORDER, PARANOID PERSONALITY DISORDER, INDICATIONS OF ORGANIC BRAIN IMPAIRMENT, PROBABLY RESPONSIBLE FOR THE [8] DEFENDANT'S DEVELOPMENTAL READING DISORDER, AND WHICH MAY VERY WELL UNDERLIE SOME OF THE DIFFICULTY HE HAS KEEPING HIS IMPULSE UNDER CONTROL.

IN ADDITION, I MIGHT POINT OUT TO YOU, NOW YOU'VE HAD AN OPPORTUNITY, AS I HAVE, TO REVIEW THAT PRESENTENCE REPORT, TO WHICH

THERE ARE MANY, MANY, MANY ATTACHMENTS BY CITIZENS IN THIS COMMUNITY, NONE OF WHOM ARE OBJECTIVE, BUT ALL OF WHOM, AS I READ THOSE REPORTS – ASK YOURSELF THE QUESTION, WHERE IS THE REQUEST THAT THIS MAN'S LIFE BE TAKEN? I DIDN'T SEE IT.

I KNOW THE PROBATION OFFICER SAID MARVIN RIGSBY THINKS HE SHOULD GET THE DEATH PENALTY. BUT IF YOU REVIEW MARVIN RIGSBY'S LETTER OF DECEMBER THE 9TH, 1981, THERE IS NO INDICATION THERE THAT A DEATH PENALTY IS REQUESTED. GRANTED, THIS MAN MAY BE A DANGER TO SOCIETY, BUT WOULD NOT SOCIETY BE SERVED BY IMPOSITION OF THE LESSER PENALTY?

THANK YOU.

THANK YOU.

THE COURT: WOULD YOU APPROACH THE BENCH, PLEASE, MR. SUMMERLIN? NO LEGAL CAUSE APPEARING, BY REASON OF THE VERDICT OF THE JURY, IT IS THE JUDGMENT OF THIS COURT THAT YOU'RE GUILTY OF THE CRIMES OF MURDER FIRST DEGREE, A CLASS 1 FELONY, AND SEXUAL ASSAULT, A CLASS 2 FELONY.

[9] AS TO SEXUAL ASSAULT, A CLASS 2 FELONY, THE COURT FINDS THE FOLLOWING AGGRAVATING CIRCUMSTANCES – AGGRAVATING FACTORS AS TO THIS CHARGE: FIRST, THE INFLICTION OF SERIOUS PHYSICAL INJURY; TWO, THE USE, THREATENED USE, OR POSSESSION OF A DANGEROUS INSTRUMENT DURING THE CRIME; THIRD, THAT THE CRIME WAS COMMITTED IN A CRUEL, HEINOUS, AND DEPRAVED MANNER; AND FOUR, A LONG

PRIOR RECORD, INCLUDING PRISON TERMS; AND FURTHER, THAT THE DEFENDANT WAS ON PROBATION AT THE TIME OF THE CRIMES.

AS TO THE SPECIAL VERDICT ON MURDER FIRST DEGREE, AND AS TO THE AGGRAVATING CIRCUMSTANCES FOR MURDER FIRST, THE COURT FINDS THE FOLLOWING: FIRST, THAT THE DEFENDANT HAS NOT BEEN CONVICTED OF ANOTHER OFFENSE IN THE UNITED STATES FOR WHICH, IN ARIZONA LAW, A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSABLE.

THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF A FELONY IN THE UNITED STATES INVOLVING THE USE OR THREAT OF VIOLENCE ON ANOTHER PERSON, TO WIT: AGGRAVATED ASSAULT, A CLASS 3 FELONY, MARICOPA COUNTY CR-119567, ON MARCH 24TH 1982.

THIRD, IN THE COMMISSION OF THE OFFENSE THE DEFENDANT DID NOT CREATE A GRAVE RISK OF DEATH TO ANOTHER PERSON IN ADDITION TO THE VICTIM OF THE OFFENSE.

[10] FOUR, THE DEFENDANT DID NOT PROCURE THE COMMISSION OF THE OFFENSE BY PAYMENT OR PROMISE OF PAYMENT OF ANYTHING OF PECUNIARY VALUE.

FIVE, THE DEFENDANT DID NOT COMMIT THE OFFENSE AS CONSIDERATION FOR THE RECEIPT, OR AN EXPECTATION OF THE RECEIPT, OF ANYTHING OF A PECUNIARY VALUE.

SIX, THE DEFENDANT COMMITTED THE OFFENSE IN AN ESPECIALLY HEINOUS, CRUEL, AND

DEPRAVED MANNER. THE KILLING WAS CRUEL. THE VICTIM RECEIVED A DEFENSIVE BLOW TO HER RIGHT HAND. THE VICTIM SUFFERED PAIN, AND MENTAL TERROR DURING AND PRIOR TO THIS BLOW.

SHE EXPERIENCED MENTAL TERROR WHILE BEING RAPED BY THE DEFENDANT, AND OBVIOUSLY EXPERIENCED THEN ACTUAL DANGER DURING THE RAPE AND DURING THE MURDER AS SEE [sic] TRIED TO DEFEND HERSELF.

THE KILLING WAS ALSO HEINOUS AND DEPRAVED, FOCUSING ON THE DEFENDANT'S MENTAL STATE. THE EVIDENCE SHOWS HE ABSOLUTELY CRUSHED THE VICTIM'S SKULL FROM ALL SIDES AFTER HE RAPED HER. THIS WAS A HEINOUS AND DEPRAVED MURDER.

SEVEN, THE DEFENDANT DID NOT COMMIT THE OFFENSE WHILE IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS, LAW ENFORCEMENT AGENCY OR A COUNTY OR CITY JAIL.

[11] AS TO THE MITIGATING CIRCUMSTANCES, THE COURT FINDS THE FOLLOWING: FIRST, THE DEFENDANT'S CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT, OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF THE LAW, WAS NOT SIGNIFICANTLY IMPAIRED, AND CERTAINLY NOT SO IMPAIRED AS TO CONSTITUTE A DEFENSE TO THE PROSECUTION.

SECOND, THE DEFENDANT WAS NOT UNDER UNUSUAL OR SUBSTANTIAL DURESS. IN FACT, THERE WAS NO EVIDENCE OF DURESS AT ALL.

THIRD, THE DEFENDANT WAS THE INDIVIDUAL WHO ACTUALLY COMMITTED THE OFFENSE, AND WAS NOT FOUND GUILTY BY REASON OF BEING LEGALLY ACCOUNTABLE FOR THE CONDUCT OF ANOTHER, UNDER THE PROVISIONS OF ARS 13-303.

THEREFORE, THIS MITIGATING CIRCUMSTANCE DOES NOT EXIST. THE DEFENDANT COULD REASONABLY HAVE FORESEEN THAT HIS CONDUCT IN THE COURSE OF THE COMMISSION OF THE OFFENSE FOR WHICH HE WAS CONVICTED WOULD CAUSE OR CREATE A GRAVE RISK OF CAUSING DEATH TO ANOTHER PERSON.

THE DEFENDANT'S AGE IS NOT A MITIGATING FACTOR.

THE COURT – HAVING TAKEN INTO ACCOUNT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, THE [12] COURT FINDS THAT TWO AGGRAVATING CIRCUMSTANCES EXIST, AND THE COURT FURTHER FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

AS PUNISHMENT FOR THE CRIME OF SEXUAL ASSAULT, IT IS ORDERED THAT YOU BE SENTENCED TO THE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 28 YEARS, TO DATE FROM THIS DATE, WITH CREDIT FOR 434 DAYS TIME SERVED, TO RUN CONSECUTIVELY TO ANY OTHER PUNISHMENT IMPOSED BY THIS COURT.

AS PUNISHMENT FOR THE CRIME OF MURDER, FIRST DEGREE, IT IS ORDERED THAT THE SHERIFF OF MARICOPA COUNTY DELIVER YOU TO THE

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, AND THERE FOR YOU TO SUFFER DEATH, IN THE MANNER PRESCRIBED BY LAW.

THE CLERK IS ORDERED TO FILE A NOTICE OF APPEAL ON BEHALF OF THE DEFENDANT.

THIS COURT WILL STAND IN RECESS.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. WARREN WESLEY SUMMERLIN, Appellant.	Supreme Court No. 5612 Maricopa County Superior Court Nos. CR-119502 and CR-125325

APPELLANT'S OPENING BRIEF

(Filed Jan. 27, 1983)

JAMES HAMILTON KEMPER
KEMPER & HENZE
45 West Jefferson, 11th Floor
Phoenix, Arizona 85003

Attorney for Appellant

* * *

ARGUMENT V

The Arizona procedure for imposition of the death penalty leaves all of the decisions upon which the penalty is predicated in the hands of the judge alone. A.R.S. §13-703. The defendant contends that this denies him his right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution. The aggravating factors found by the trial judge to justify imposition of the death penalty in Summerlin were that the defendant had been previously convicted of a felony in the United States of use of threat or violence to another person and that the defendant committed the offense in an especially heinous, cruel and depraved manner. (RA 92) The second of these

aggravating factors is a factual determination about the nature of the crime rather than a determination about the nature of the defendant and his background. The defendant, therefore, relies upon *State v. Quinn*, 50 Or. App. 383, 623 P.2d 630 (1981) where the court said, in striking down the Oregon statute:

> " . . . the facts which constitute the crime are for the jury and those which characterize the defendant are for the judge." 623 P.2d at 643.

* * *

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675 P.2d 686

STATE of Arizona, Appellee,

v.

Warren Wesley SUMMERLIN, Appellant.

No. 5612.

Supreme Court of Arizona,
In Banc.

Nov. 21, 1983.

Reconsideration Denied Jan. 17, 1984.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jessica Gifford Funkhouser, Asst. Attys. Gen., Phoenix, for appellee.

Kemper & Henze by James Hamilton Kemper, Phoenix, for appellant.

CAMERON, Justice.

Defendant, Warren Wesley Summerlin, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, and sexual assault, A.R.S. § 13-1406. The defendant was sentenced to death for the murder, A.R.S. § 13-703, and to twenty-eight years for the sexual assault, both sentences to be served consecutively. An automatic appeal to this court followed pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Was defendant's motion to suppress evidence obtained pursuant to a search warrant properly denied?

II. Did the trial court improperly comment on the evidence in front of the jury?

III. Was the trial court's admission into evidence of eight autopsy photographs of the victim erroneous?

IV. Was the defendant's anti-marital fact privilege violated?

V. Does defendant have a right to a jury determination of factual questions that lead to imposition of the death penalty?

VI. Is the Arizona death penalty statute unconstitutional because it fails to provide guidance for weighing and balancing aggravating and mitigating circumstances?

VII. Does this court find in its independent review that the death penalty was appropriate in this case?

VIII. Is the death penalty in this case proportionate to the disposition of other similar cases?

The facts necessary for a resolution of these issues are as follows. At approximately 8:30 a.m. on 29 April 1981 the victim left her place of business (Finance America) in Tempe, Arizona. The victim was a delinquent-account investigator, and was occasionally required to personally visit the residences of persons whose accounts were delinquent and who could not be reached by phone. On this particular day, her agenda included visits to two residences, the first visit being to the residence of defendant, Warren Summerlin. Upon completing a visit, the victim routinely called back to Finance America and

notified her superior of her whereabouts. On this particular day Mr. Buchanan, the victim's superior, never received such a call.

Marvin Rigsby, the victim's boyfriend, typically spoke with the victim several times during the day while she was at work. When he called Finance America and learned that she had not returned or called the office after leaving that morning, he asked for and received from Mr. Buchanan the addresses that the victim was supposed to visit that day. Mr. Rigsby arrived at defendant's house at approximately 5 p.m. and spoke with the defendant. Mr. Rigsby described the victim and asked the defendant if anyone resembling her had visited defendant that day. Defendant answered affirmatively, stating that the victim left his house at approximately 10:30 a.m. After leaving defendant's residence, Mr. Rigsby drove to the second address. The woman residing at this address told Mr. Rigsby that she had been home all day, and had not received a visit from anyone. That evening Mr. Rigsby relayed the preceding information to the police.

That same evening, Officer Brunk received an anonymous "Silent Witness" call concerning the present case. The female caller stated that she had information concerning the woman from "Pacific Finance Company" who was reported missing. The caller further stated she thought that this woman had been killed by Warren Summerlin, who resided at 3342 West Willetta in Phoenix, and that Mr. Summerlin had rolled up the victim's body in a carpet. The caller was later identified as the defendant's mother-in-law.

At approximately 5 a.m. the next day, Mr. William Goodman was working at the "Low Cost Market" at 35th

Avenue and Van Buren in Phoenix. At this time, a road paving crew directed his attention to a brown Mustang car parked in the parking lot of Mr. Goodman's store. Mr. Goodman, who had served in Vietnam, went outside to observe the car and recognized the odor of a decaying body. He also observed a pair of women's panties and shoes lying on the backseat of the car. Mr. Goodman walked back to his store and called the police.

Detective Klettlinger arrived at the parking lot to investigate. He forced open the lock of the trunk of the brown Mustang, later identified as the victim's car, and found the victim's dead body rolled up in a bedspread. The bedspread was covered with blood and contained green carpet tufts, sponge padding, and long red hairs. A piece of bloody plastic was also found with the body. The victim was nude from the waist down, and Detective Klettlinger observed a white milky substance on her genitalia.

Based upon the above information, Officer Davis of the Phoenix Police Department obtained a search warrant which was served at defendant's residence by Detective Klettlinger at approximately 5:30 p.m. on 30 April 1981. After serving the warrant, Detective Klettlinger seized carpeting and padding from inside the house, bloody men's boots and a hoe with hair on it resting by a door outside the house, and a bloody child's reader and bloody floor tiles in a garbage can outside the house.

Detective Fuqua, also of the Phoenix Police Department, accompanied Detective Klettlinger during the search of defendant's residence. Detective Fuqua read the search warrant to defendant, and the defendant said, "I didn't kill nobody." Detective Fuqua did not reply, and defendant asked, "Is this in reference to the girl that was

at my house?" Detective Fuqua asked, "What girl?", and the defendant stated "the lady that came to the house about 10:00 in the morning, reference to [my] wife's piano." The defendant was then advised of his rights, and indicated he understood these rights. During this time, defendant's wife identified the bedspread found with the victim as belonging to the Summerlin household.

Detective Klettlinger again advised defendant of his rights, arrested defendant, and transported him to the main Phoenix police station. At the police station, defendant asked to speak with his wife, and Detective Fuqua arranged this meeting. When Mrs. Summerlin arrived, Detectives Fuqua and Martinsen were present in the interviewing room. Defendant requested a private conversation with his wife, and Detective Fuqua told him this was impossible. While the detectives remained in the interviewing room, defendant proceeded to make several incriminating statements to his wife. After returning Mrs. Summerlin to her home at approximately 8:05 p.m., Mrs. Summerlin gave Detective Martinsen permission to further search the residence. Detective Martinsen seized some men's clothing that had been soaking in a bathtub and a towel was also seized. Mrs. Summerlin told Detective Martinsen about these items before they entered the house.

The defendant was tried and convicted by a jury and now appeals.

EVIDENCE FOUND PURSUANT
TO SEARCH WARRANT

The affidavit in support of the warrant read in part:

> IN SUMMARY, [THE VICTIM] was last known to have gone to 3342 West Willetta on a delinquent account for FINANCE OF AMERICA. She was to contact a MR. & MRS. SUMMERLIN who [lived] in the rear house at this address. [THE VICTIM] never showed up at her next appointment at 3843 West Abraham. A W/M at 3342 West Willetta (rear house) identified himself as the husband of MRS. SUMMERLIN. He said that [THE VICTIM] had contacted him at approximately 10 a.m., that morning, April 29, 1981, and had left. Silent Witness Call # 1594 advised that the SUSPECT is a WARREN SUMMERLIN, W/M, 32-35 years, and he may have killed the VICTIM. The VICTIM['S] body was found in the locked trunk of her car in the west parking lot at 3442 West Van Buren. Her keys, purse and credit cards are missing. The VICTIM was wrapped in a white plastic bed-liner cover, bed sheet or water bed liner. She had apparently been killed at another location, placed in the trunk of her car and driven to 3442 West Van Buren.

Defendant contends that the warrant was based on an anonymous tip and controlled by the "two-pronged" test established by the United States Supreme Court's decisions in *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). We need not rely, however, upon the anonymous tip, as we believe that there were sufficient facts without the anonymous tip upon which to base a valid warrant. We agree, however, that an

informant who contacts the police through the Silent Witness program commands a greater expectation of reliability than the average police informant. *State v. Turney,* 134 Ariz. 238, 241, 655 P.2d 358, 361 (App.1982); *State v. Collins,* 21 Ariz.App. 575, 578, 522 P.2d 40, 43 (1974). Unlike the usual police informant who frequently seeks some favor from the police in return for his information, the silent witness generally wants nothing in return for his or her tip. Absent other evidence as to the corrupt motive of the anonymous caller, such an informant is considered reliable and credible. *Turney;* and *Collins,* supra.

Concerning probable cause, the Ninth Circuit Court of Appeals has stated that:

> affidavits are to be interpreted in a common sense and realistic manner, * * * and * * * probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of reasonable caution in the belief that the items to be seized were in the stated place, * * .

United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir.1970). When evaluating an affidavit, "[a] search warrant may not be issued unless the issuing magistrate has probable cause to believe a crime was committed * * * ." *State v. Berge,* 130 Ariz. 135, 136, 634 P.2d 947, 948 (1981) (citation omitted). See also *United States v. Ventresca,* 380 U.S. 102, 108-09, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965) (cited in *Berge,* supra, with approval); *State v. Hale,* 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982).

In the instant case, probable cause existed to believe that the victim's missing keys, purse, and credit cards might be found at the defendant's residence. A missing

person report on the victim had been filed by Mr. Rigsby, stating that the victim had left her office that morning to call on the Summerlin residence, and had not been heard from again. Her employer, Mr. Buchanan, verified that it was customary for the victim to call the office after completing a call on a delinquent account and that the victim did not do this during the morning in question. Mr. Rigsby visited the house where the victim was to make her second call of the day, and was told by the occupant that the victim had never arrived at the house. The body of the victim had been found, and murder was unquestionably the cause of her death. We believe there was indeed probable cause to issue a warrant to search defendant's residence, even without the anonymous call.[1]

Defendant contends further that the court should have suppressed the items retrieved from defendant's bathroom after defendant was taken to the police station. These items were found by the police after defendant's wife consented to a further search of the house. We have stated that:

> It is well settled that a warrantless search of property is valid if conducted pursuant to a voluntary consent. *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *State v. Tucker,* 118 Ariz. 76, 78, 574 P.2d 1295, 1297 (1978), *cert. denied,* 439 U.S. 846, 99 S.Ct. 144, 58 L.Ed.2d 147 (1978). "A consent to search

[1] We therefore do not consider the applicability of *Illinois v. Gates,* ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Although Gates is applicable to search warrants obtained after the date of its issuance (8 June 1983), the opinion is silent as to whether it should be applied retroactively.

> may be evidenced by conduct as well as by words. However, the constitutional protection against unreasonable searches demands a waiver by unequivocal words or conduct expressing consent." *State v. Tucker, supra,* 118 Ariz. at 78-79, 574 P.2d at 1297-98. These same principles apply where the consent is given by one who possesses common authority over the premises or effects. In such a situation, the consent is valid as against the absent, non-consenting person with whom that authority is shared. *United States v. Matlock, supra,* 415 U.S. at 171, 94 S.Ct. at 993.

State v. Schad, 129 Ariz. 557, 563, 633 P.2d 366, 372 (1981). Accord, *United States v. Long,* 524 F.2d 660, 661 (9th Cir.1975); *Yuma County Attorney v. McGuire,* 111 Ariz. 437, 438, 532 P.2d 157, 158 (1975). The wife had common authority over the house, and her consent was valid against the defendant. *State v. Schad,* supra. We find no error.

"COMMENTING" ON THE EVIDENCE

During jury selection, the following transpired:

> THE COURT: * * * As you heard me call the case it's entitled the State of Arizona versus Warren Wesley Summerlin. This is a criminal case, in which the defendant is accused by the State of Arizona of, on the date of April 29th, 1981, having sexually assaulted and murdered [the victim].
>
> Have any of you heard about this case, formed any opinions about it, or heard about it by any information on the news media?

I might again say that this will be the first time that I'm hearing the facts, just as it will be the first time that you folks are hearing the facts. But as I understand, and counsel can correct me, it has been in the news media before.

It concerned, I believe, a collection agent or a bill collector, who was the decedent, and the attempt by her to go out to the defendant's residence, and at that time the incident took place.

Is that basically, as a very rough sketch, just to give the jury an idea where we are at?

MS. GIFFORD: That's close, Your Honor.

THE COURT: Counsel, is that fair, Mr. Klink?

MR. KLINK: Well, may we approach the bench?

THE COURT: Yes.

* * *

MR. KLINK: Sorry to break this up here, Your Honor. I believe you've related some facts that are not in the indictment, and I believe that is an improper comment on the evidence.

THE COURT: What facts are those?

MR. KLINK: Well, those were that the bill collector had gone out to the defendant's home to collect a bill. And while there may or maybe be testimony about that. I believe it is a comment on the evidence, and on that basis I would move for a mistrial at this point in time.

THE COURT: I'll deny your motion. * *

* * *

(The following proceedings were held in open court in the presence of the jury.)

THE COURT: As I indicated, the event took place at 33 – or was alleged to have taken place at 3342 West Willetta.

Are any of you aware or familiar with this incident or have heard about it or read about it in the media?

Defendant alleges that these statements made by the trial judge to the jury were improper comments concerning disputed evidence. Under our state Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. Art. 6, § 27. We have stated that:

> The purpose of Art. 6, § 27 is to prohibit the judges from expressing their opinion as to evidentiary matters. The constitutional provision does not forbid a trial court from making reference to the evidence, but it does forbid comment. The word comment as used in the constitutional provision has been construed to mean the expression of opinion.

State v. Barnett, 111 Ariz. 391, 393, 531 P.2d 148, 150 (1975) (citations omitted). *E.g., State v. Britson,* 130 Ariz. 380, 385, 636 P.2d 628, 633 (1981); *State v. Barnes,* 124 Ariz. 586, 590, 606 P.2d 802, 806 (1980).

Defendant first contends that the trial judge's statement that, "It concerned, I believe, a collection agent or bill collector, who was the decedent, and the attempt by her to go out to the defendant's residence, and at that time the incident took place," constituted a comment on the evidence. We do not agree. The judge was not commenting on the evidence, but was giving the jury a factual background in order to determine whether any of the jurors should be excluded from jury duty. For such purpose, some statement of the facts is necessary. The judge did not indicate that the victim did visit, but rather he "believe[d]" and she "attempted" to visit. While "alleged attempt" might have been better phrasing than just the word "attempted" used alone, we do not find that this indicated to the jury an opinion by the court that the victim did, in fact, visit the defendant's residence, and we find no prejudice to the defendant.

Secondly, the defendant alleges that the statement "As I indicated, the event took place at 33 – or was alleged to have taken place at 3342 West Willetta" was also a comment on the evidence. We cannot agree that the words "the event took place at," which were immediately changed to, "was alleged to have taken place at" as soon as they were spoken, so prejudiced the minds of the jury that they were precluded from acting impartially towards defendant. Even if this statement could be considered a comment on the evidence, such "comment" was negated by the words which followed, and the resulting error, if any, was not prejudicial.

ADMISSION INTO EVIDENCE OF AUTOPSY PHOTOGRAPHS

Defendant alleges that eight autopsy photographs of the victim were admitted into evidence solely to prejudice the jury. The photographs show various gashes to the victim's skull, and none of the photographs were repetitive. We have stated that:

> [G]ruesome or inflammatory evidence may be admitted if it is material to some aspect of the case. * * * In such circumstances, the trial court must determine whether the probative value of the evidence outweighs its potential to prejudice the jury.

State v. Gerlaugh, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982), supplemented in 135 Ariz. 89, 659 P.2d 642 (1983) (citations omitted). *E.g., State v. Hicks,* 133 Ariz. 64, 69, 649 P.2d 267, 272 (1982); *State v. Schad,* 129 Ariz. 557, 571-72, 633 P.2d 366, 380-81 (1981); *State v. Steele,* 120 Ariz. 462, 464, 586 P.2d 1274, 1276 (1978). Gruesome photographs are properly admissible for a variety of reasons. We have stated that:

> In *State v. Thomas,* 110 Ariz. 120, 515 P.2d 865 (1973), we identified the following uses for which photographs of a corpse may be admitted in a homicide prosecution: to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed. *Id.* at 130, 515 P.2d at 875.

State v. Chapple, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). *E.g., State v. Gerlaugh,* supra, 134 Ariz. at 169, 654 P.2d at 805; *State v. Hicks,* supra, 133 Ariz. at 69, 649 P.2d at 272; *State v. Schad,* supra, 129 Ariz. at 571-72, 633 P.2d at 380-81. The State argues that the pictures were admitted to show premeditation and to help one of the State's witnesses explain his testimony. The trial court agreed with the State, and we will not disturb such a ruling on appeal unless the trial court has clearly abused its discretion. *State v. Gerlaugh,* supra, 134 Ariz. at 169, 654 P.2d at 805. *Accord, State v. Ferrari,* 112 Ariz. 324, 333, 541 P.2d 921, 930 (1975). After reviewing the record and viewing the photographs, we find that none of the autopsy photographs introduced at trial were repetitive, and each illustrated an important piece of evidence when considering the issue of premeditation. The state's witness testified that any one of the blows to the victim's head was sufficient to kill the victim, yet numerous, deep lacerations were evident from the photographs. We believe defendant's excessive and purposeful actions demonstrate more than just a "reactionary" homicide. The photographs were a visual record of defendant's intent, were relevant as to defendant's premeditation, and were properly admitted at trial. Additionally, the state's witness testified that the pictures were a helpful testimonial aid. In light of the above, we hold that the trial court did not abuse its discretion in admitting the photographs.

ANTI-MARITAL FACT PRIVILEGE

Detective Fuqua gave the following testimony at trial:

> [Detective Fuqua]: When Mr. Summerlin's wife came into the room she sat down next to me, putting her directly across from him. And he

> made a statement "I knew this had to happen."
>
> * * *
>
> His wife responded "What do you mean?" And he then stated "This was the big crime."
>
> * * *
>
> His last statement he stated was, quote, "I don't like to pay bills and all the other bullshit," unquote.
>
> * * *
>
> Then he told her just prior to the end of the interview, that – not for her to worry, because the police wouldn't find anything in the house.

Defendant asserted that his anti-marital fact privilege was violated when the police officer so testified. The relevant statute read in pertinent part:

> A person shall not be examined as a witness in the following cases:
>
> 1. A husband for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without consent of the other, examined as to any communication made by one to the other during the marriage * * * . [Former] A.R.S. § 13-4062.

This statute prevents the calling of one spouse to testify against the other; it does not apply to conversations between husband and wife that are overheard by a third party. Because defendant asked for privacy, which was expressly denied by the police, defendant asserted that

everything he said during the conversation with his wife at the police station was privileged. We do not agree. Defendant Summerlin was warned by the police officers that he could not meet privately with his wife. Since the officers stood in the same room with defendant and his wife, defendant should have known that he risked the officers hearing part or all of his conversation. We have previously ruled on this issue in a case with a fact situation very similar to the present case:

> Officer Smith testified to a conversation he overheard between defendant and his wife while in the Sheriff's office. * * * [The officer] overheard Mrs. Narten say to the defendant: "Karl, you must tell me the truth" to which the defendant replied: "What do you want to do, send me to the gas chamber?" It is argued that Officer Smith's testimony was admitted in violation of the anti-marital fact privilege. [Former] § 13-1802 A.R.S. In *De-Leon v. Territory,* 9 Ariz. 161, 80 P. 348 this court held that the defendant waived the privilege when he wrote a letter from jail to his wife knowing that the jailer would read it. Communications between husband and wife are generally not confidential when made in the presence of a third person. Rather, the husband and wife are incompetent witnesses.

State v. Narten, 99 Ariz. 116, 124, 407 P.2d 81, 87 (1965). *Accord, Narten v. Eyman,* 460 F.2d 184, 191 (9th Cir.1969) (upholding *State v. Narten,* supra). Defendant further contends, however, that the case of *State v. Barnhart,* 73 Wash.2d 936, 442 P.2d 959 (1968), supports his position. We do not agree. In Barnhart, the court stated:

> Another error is directed against the admission of a statement made by appellant to his wife, over the sheriff's telephone, in the presence of the sheriff's secretary. There was no testimony that the appellant objected to talking to his wife in the presence of the secretary. He saw her sitting across the desk from him when the telephone connection had been made. A statement in the presence of a third person, by a husband to his wife, loses its privileged character. If the communication is heard by a third person, even if an eavesdropper, the third person may testify to it, since the privilege protects only successful confidences. (citation omitted) Consequently, the statement made, as related by the sheriff's secretary, was properly admissible.

Id. 442 P.2d at 961-62. We hold that defendant's anti-marital fact privilege was not violated.

IMPOSITION OF THE DEATH PENALTY UNDER A.R.S. § 13-703

Defendant next alleges that our state death penalty statute, A.R.S. § 13-703, is unconstitutional because it requires that the trial judge determine whether to impose the death penalty. Within the last decade, the United States Supreme Court has addressed this issue:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois,* 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 [n. 15], 20 L.Ed.2d 776, [783] (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should

> lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913, 922-23 (1976) (footnote omitted). We have expressly followed the mandate of Proffitt in rejecting similar arguments that there is a right under the Sixth Amendment of the United States Constitution to have a jury participate in the capital sentencing decision. *State v. Gretzler,* 135 Ariz. 42, 56, 659 P.2d 1, 15 (1983) and cases cited therein. See also, *Richmond v. Cardwell,* 450 F.Supp. 519, 523 (D. Ariz. 1978); *State v. Lambright,* 138 Ariz. 63, 673 P.2d 1 (1983). We find no error.

WEIGHING AND BALANCING AGGRAVATING AND MITIGATING CIRCUMSTANCES UNDER A.R.S. § 13-703

Defendant further attacks A.R.S. § 13-703, stating that the statute does not provide uniform standards for weighing and balancing aggravating and mitigating circumstances, resulting in arbitrary and capricious imposition of the death penalty. We disagree with the defendant for the reasons set forth in *State v. Gretzler,* supra, 135 Ariz. at 53-55, 659 P.2d at 12-14. *Accord, State v. Lambright,* supra, 138 Ariz. at 63, 673 P.2d 1.

INDEPENDENT REVIEW CONCERNING AGGRAVATING AND MITIGATING CIRCUMSTANCES

Under A.R.S. § 13-703, this court is required to conduct an independent review of the trial court's decision concerning the balancing of aggravating and mitigating circumstances. *State v. Gretzler,* supra, 135 Ariz. at 57, 659 P.2d at 16. We have done so and conclude that the trial court correctly found two aggravating circumstances and no mitigating circumstances sufficient to call for leniency. The two aggravating circumstances were that the defendant had previously been convicted of a felony in the United States involving the use or threat of violence on another person, A.R.S. § 13-703(F)(2), and that the defendant committed the offense in an especially heinous, cruel, or depraved manner. A.R.S. § 13-703(F)(6). As concerning this second circumstance we have stated that, "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Gretzler,* supra, at 51, 659 P.2d at 10. Evidence of the victim's bruised hand indicates that she attempted to ward off blows. This evidence and the evidence of rape are indications of physical and mental pain. These acts constitute cruelty. As for defendant's state of mind, we must consider such things as defendant's "apparent relishing of the murder," "inflicting of gratuitous violence on the victim," "needless mutilation of the victim," and "senselessness of the crime, and helplessness of the victim." *State v. Gretzler,* supra, at 52, 659 P.2d at 11. We find that all of the above-listed circumstances were present. The coroner who conducted the autopsy on the victim's body stated at trial that the several blows to the victim's head were far more in number than those needed to kill her. It is obvious from the battered condition of the

victim's body that she was incapable of defending herself. We find that two aggravating and no mitigating circumstances were present in this case, and that the death penalty is appropriate under A.R.S. § 13-703.

PROPORTIONALITY REVIEW

We must also consider whether imposition of the death sentence in this case is proportionate to imposition of the death sentence in similar cases. *State v. Gretzler,* supra, at 58, 659 P.2d at 17, and cases cited therein. One similar case is *State v. Jeffers,* 135 Ariz. 404, 661 P.2d 1105 (1983), where defendant lured an ex-girlfriend to his motel room by offering her heroin. The victim was given an overdose of heroin and passed out. She was then strangled and given another heroin injection. Defendant then beat the victim's dead body. *Id.* at 412, 661 P.2d at 1113. This court found that although the crime was not cruelly committed, it was committed in a heinous and depraved manner, and that the death penalty was properly imposed. *Id.* at 428-30, 661 P.2d at 1129-31. Another similar case is *State v. Zaragoza,* 135 Ariz. 63, 659 P.2d 22 (1983). There, defendant attempted to or did sexually assault the victim, and then murdered her by hitting her several times in the head with a blunt object. *Id.* at 65, 659 P.2d at 24. Two aggravating circumstances were found: two prior convictions of felonies involving the use or threat of violence, and a heinous or depraved mental state on defendant's part during the murder. Again, we upheld imposition of the death penalty. *Id.* at 69-71, 659 P.2d at 28-30.

Additionally, we have considered cases where the death penalty was reduced to life imprisonment, and find that the facts were significantly different from the facts in

this case. See *State v. Lujan,* 124 Ariz. 365, 604 P.2d 629 (1979) (victim's death not committed in heinous, cruel or depraved manner, so no aggravating circumstance found); *State v. Brookover,* 124 Ariz. 38, 601 P.2d 1322 (1979) (death penalty reduced to life imprisonment due to mitigating circumstance).

We have examined the entire record for fundamental error pursuant to A.R.S. § 13-4035 and find none.

Defendant's convictions and sentences for sexual assault and first degree murder are affirmed.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS and FELDMAN, JJ., concur.

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Plaintiff, vs. WARREN WESLEY SUMMERLIN, Defendant,	) No. CR-119502)) ATTACHMENT A:) FACTS IN SUPPORT) OF PETITION FOR) POST-CONVICTION) RELIEF (RULE 32))) (Filed May 11, 1988)

I. BACKGROUND

Petitioner, Warren Wesley Summerlin ("Summerlin"), was convicted of first degree murder and sexual assault on June 8, 1982. He was given an aggravated sentence of 28 years for the sexual assault. After an aggravation/mitigation hearing on July 8, 1982, at which two aggravating and no mitigating circumstances were found, Summerlin was sentenced to death for the murder. Summerlin's conviction and death sentence were affirmed on direct appeal to the Arizona Supreme Court on November 21, 1983. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983).

* * *

V. THE ARIZONA DEATH PENALTY STATUTE (A.R.S. § 13-703) IS UNCONSTITUTIONAL, GENERALLY, AND AS APPLIED TO SUMMERLIN'S TRIAL AND SENTENCE.

A. The Arizona death penalty statute unconstitutionally permits a finding of guilt or innocence of the crime of capital murder without a jury determination of all of the elements thereof, in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America. In addition, petitioner was denied a jury trial upon critical elements of the crime of capital murder by the Arizona courts in violation of his rights under the sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

A.R.S. § 13-1105 defines first degree murder. As applicable to this case, it provides that a homicide constitutes first degree murder when:

> 1. Knowing that his conduct will cause death, such person causes the death of another with premeditation; or
>
> 2. Acting either alone or with one or more other person, such person commits or attempts to commit sexual assault under § 13-1406 . . . and in the course of and in furtherance of such offense . . . such person . . . causes the death of any person.

Subsection (c) of A.R.S. § 13-1105 provides that first degree murder is punishable by death or life imprisonment as provided by § 13-703.

Although A.R.S. § 13-703 purports to relate only to sentencing and has frequently been called Arizona's "death penalty statute", by its inclusion in A.R.S § 13-1105, by its

terms and by its application in the State of Arizona, it creates two subclasses of first degree murder: Capital murder and non-capital murder. Capital murder consists of those first degree murders in which the court finds one or more of the aggravating circumstances enumerated in subsection (F) of A.R.S. § 13-703 and no mitigating circumstances or insufficient mitigating circumstances to call for leniency. Non-capital murder consists of all other first degree murders as well as second degree murders.

There are seven aggravating circumstances provided in subsection (F) of A.R.S. § 13-703. Subsection (F) (6) of that statute specifically provides that commission of the offense in "an especially heinous, cruel or depraved manner" constitutes an aggravating circumstance. Thus, the *circumstances of the homicide* are specifically made relevant to a determination whether the crime is capital murder or non-capital murder.

The Arizona courts have held (by inference) that aggravating circumstances are elements of the crime by requiring that they must be proved by competent evidence beyond a reasonable doubt. *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) aff'd 106 S. Ct. 1749, 90 L.Ed. 2d 123; *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). Mere labeling as "aggravating factors" rather than elements of the statutory offense does not change their essential function. *Mullaney v. Wilbur*, 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). The relevant question is not how the fact is labeled but whether it is an "ingredient of an offense . . . a fact which the state deems so important that it must be either proved or presumed. . . . " *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281

(1977). Here, the "aggravating factors" (at least as set forth in subsection (F) (6)) are elements of *mens rea*, "the requisite culpable mental state with which the crime was committed", among the most fundamental facts to which the right to jury trial applies. *State v. Quinn*, 623 P.2d 630 (Ore. 1981). Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element of the crime. *Mullaney v. Wilber*, *supra*; *State v. Quinn*, *supra*. *Cf.* A.R.S. § § 13-1102, 13-1102, 13-1104 and 13-1105 (defining negligent homicide, manslaughter, second degree murder and first degree murder, respectively); and A.R.S. § § 13-1203 and 13-1104 (defining assault and aggravated assault, respectively).

The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States require that in criminal cases due process of law includes the right to a jury trial upon all issues constituting the offense. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 39 (1979); *Morrissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *United States v. Battiste*, 2 Sumner 240 (1835).

A.R.S. § 13-703(B) provides that the determination of aggravating factors, including the aggravating factors set forth in subsection (F) (6), shall be heard "before the court alone" without a jury. Because that determination requires a factual inquiry into the circumstances of the homicide, including the acts of the defendant and his mental state at the time of the commission of the offense, without the right to a jury, the statute is unconstitutional, in violation of the Sixth, Eighth and Fourteenth Amendments.

The petitioner was sentenced under the statutory provisions set forth above and the trial court made a determination that the crime was committed "in an especially heinous, cruel or depraved manner" under subsection (F) (6) of the statute. That determination was made by the court, alone, without a jury, in violation of the petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The sentence must be set aside and a new pre-sentence hearing ordered which complies with the constitutional guarantee of a jury trial on all issues relating to elements of the offense upon which sentence is imposed.

* * *

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WARREN WESLEY SUMMERLIN, Petitioner vs. SAMUEL LEWIS, *et al*, Respondents	**NO. CIV 86-0584 PHX ROS** **SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS** (Filed Nov. 22, 1995)

TO THE UNITED STATES DISTRICT COURT for the District of Arizona:

1. The name and location of the Court that entered the judgment of conviction and sentence under attack are: The Superior Court of Maricopa County, Phoenix, Arizona, numbers CR 119502 and CR 125325.

2. The Judgment of conviction was entered on July 12, 1982 and affirmed by the Arizona Supreme Court on November 21, 1983.

* * *

1. The Arizona death penalty statute unconstitutionally permits a finding of guilt or innocence of the crime of capital murder without a jury determination of all of the elements thereof, in violation of the Sixth, Eighth and Fourteenth Amendment [sic] **to the Constitution of the United States of America. In addition, Petitioner was denied a jury trial upon critical elements of the crime of capital murder by the Arizona courts in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.**

A.R.S. § 13-1105 defines first degree murder. As applicable to this case, it provides that a homicide constitutes first degree murder when:

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Subsection (c) of A.R.S. §13-1105 provides that first degree murder is punishable by death or life imprisonment as provided by §13-703.

Although A.R.S. §13-703 purports to relate only to sentencing and has frequently been called Arizona's "death penalty statute", by its inclusion in A.R.S §13-1105, by its terms and its application in the State of Arizona, it creates two subclasses of first degree murder: Capital murder and non-capital murder. Capital murder consists of those first degree murders in which the court finds one or more of the aggravating circumstances enumerated in subsection (F) of A.R.S. §13-703 and no mitigating circumstances or insufficient mitigating circumstances to call for leniency. Non-capital murder consists of all other first degree murders as well as second degree murders.

There are seven aggravating circumstances provided in subsection (F) of A.R.S. §13-703. Subsection (F)(6) of that statute specifically provides that commission of the offense in "an especially heinous, cruel or depraved manner" constitutes an aggravating circumstance. Thus, the *circumstances of the homicide* are specifically made relevant to a determination whether the crime is capital murder or non-capital murder.

The Arizona courts have held (by inference) that aggravating circumstances are elements of the crime by requiring that they must be proved by competent evidence beyond a reasonable doubt. *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) aff'd 106 S. Ct. 1749, 90, L.Ed. 2d 123; *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied* 449 U.S. 986 (1980). Mere labeling as "aggravating factors" rather than elements of the statutory offense does not change their essential function. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The relevant question is not how the fact is labeled but whether it is an "ingredient of an offense . . . a fact which the state deems so important that it must be either proved

or presumed. . . . " *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Here, the "aggravating factors" (at least as set forth in subsection (F)(6)) are elements of *mens rea*, "the requisite culpable mental state with which the crime was committed", among the most fundamental acts to which the right to jury trial applies. *State v. Quinn*, 623 P.2d 630 (Ore. 1981). Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element [sic] the crime. *Mullaney v. Wilber*, *supra*; *State v. Quinn*, *supra*. *Cf.* A.R.S. §§13-1102, 13-1103, 13-1104 and 13-1105 (defining negligent homicide, manslaughter, second degree murder and first degree murder, respectively); and A.R.S. §§ 13-1203 and 13-1104 (defining assault and aggravated assault, respectively).

The Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States require that in criminal cases due process of law includes the right to a jury trial upon all issues constituting the offense. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) ; *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *United States v. Battiste*, 2 Sumner 240 (1835).

A.R.S. §13-703(B) provides that the determination of aggravating factors, including the aggravating factors set forth in subsection (F)(6), shall be heard "before the court alone" without a jury. Because that determination requires a factual inquiry into the circumstances of the homicide, including the acts of the defendant and his mental state at the time of the commission of the offense, without the right to a jury, the statute is unconstitutional,

in violation of the Sixth, Eighth and Fourteenth Amendments.

The petitioner was sentenced under the statutory provisions set forth above and the trial court made a termination [sic] that the crime was committed "in an especially heinous, cruel or depraved manner" under subsection (F)(6) of the satute [sic]. That determination was made by the court, alone, without jury, in violation of the petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The sentence must be set aside and a new presentence hearing ordered which complies with the constitutional guarantee of a jury trial on all issues relating to elements of the offense upon which sentence is imposed.

* * *